In the Supreme Court of the United States

OCTOBER TERM, 1967

No. 745

ARMAND F. ROBERGE, PETITIONER

v.

COMMISSIONER OF INTERNAL REVENUE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

MEMORANDUM FOR THE RESPONDENT IN OPPOSITION

The question here is whether the Tax Court and the court of appeals correctly rejected petitioner's claim that the gain he realized on the sale of a building and lot located at 455 North 35th Street, in Seattle, Washington, should not be recognized for purposes of the federal income tax. Those courts rejected petitioner's alternative arguments that the transaction was an exchange of property of "like kind," (see Section 1031 of the Internal Revenue Code of 1954), an "involuntary conversion" (see Section 1033), or the sale of his residence followed within a year by a purchase of another residence (see Section 1034 of the Code).

284-884—67

On April 4, 1947, petitioner acquired a building and the land on which it is located at 455 North 35th Street, Seattle, Washington, for $4,250. He converted this property into a duplex and rented it. He made improvements and additions to this property during the years 1947 through 1959 in the total amount of $14,196. (Pet. A2; I–R. 48.) Depreciation was allowed on the property on the basis of a 15-year useful life (Pet. A2–A3; I–R 48, 49, 50–51).

In 1961, petitioner sold the 35th Street property to Seattle Disposal Company, a private corporation, for $12,000 cash (Pet. A3; I–R. 50–51). In the same year he sold other Seattle property, on 54th Street, for $15,000, payable in installments. Also in 1961, he purchased land at 12508 Eighth Place, Everett, Washington, and constructed a residence on it. (Pet. 8, A3; I–R. 51.)

The Commissioner of Internal Revenue determined that the taxpayer realized a long-term capital gain on the sale of the 35th Street property (Pet. A3; I–R. 8). No gain was realized on the 54th Street transaction in 1961 because petitioner did not recover his adjusted cost basis in that year (Pet. A3; I–R. 51, 52, 76). Petitioner concedes he had gain on the 35th Street property, but has contended throughout that he is entitled to nonrecognition treatment. In a proceeding for redetermination, the Tax Court upheld the Commissioner's position on the 35th Street property, resulting, after certain stipulated adjustments, in a decision that there was a deficiency in income tax due for 1961 in the amount of $941 (Pet. A1, A4; I–R. 224). Upon petitioner's appeal, the court of ap-

peals affirmed *per curiam* "for the reasons stated in the opinion of the Tax Court." (Pet. A8.)

The decision below was correct and there is no conflict of decisions or any other basis for further review by this Court.

1. Section 1031(a) postpones recognition of gain where property held for productive use or investment is exchanged for like-kind property. It is the evident theory of petitioner that his sale of the property at 455 North 35th Street and his subsequent purchase of property at 12508 Eighth Place in the same year should be treated as an *exchange* for purposes of the statute. But where a sale occurs, however soon it may be followed by a reinvestment in similar property, it does not qualify. *Coastal Terminals, Inc.* v. *United States,* 320 F. 2d 333 (C.A. 4); *Trenton Cotton Oil Co.* v. *Commissioner,* 147 F. 2d 33 (C.A. 6); *Rogers* v. *Commissioner,* 377 F. 2d 534 (C.A. 9).

2. Section 1033(a) has no application to this case because there is no evidence that petitioner's sale of the property at 455 North 35th Street was anything other than what it purported to be—a voluntary sale to a private corporation for cash. (Pet. A5; I–R. 204.) In order to qualify for non-recognition of gain under that portion of Section 1033(a) relating to condemnation and requisition—on which petitioner relies—a taxpayer must show that some governmental authority either instituted condemnation proceedings or threatened to do so. *Hitke* v. *Commissioner,* 296 F. 2d 639 (C.A. 7); see also, *Dear Publication & Radio, Inc.* v. *Commissioner,* 274 F. 2d 656 (C.A. 3). That a mere

change in zoning may have resulted in petitioner's decision to sell is not enough.

3. A complete bar to petitioner's claimed qualification under Section 1034 is the finding of the Tax Court that the 35th Street property was not his principal residence at the time of sale (Pet. A6; I–R. 205). The finding here is supported by substantial evidence, including a stipulation that petitioner lived at other places in 1961, that he taught school in another town (Cle Elum), and that on his federal income tax returns he treated the property as rental and investment property (I–R. 47, 48, 51, 70). The question of what constitutes a taxpayer's principal residence depends, of course, upon all the facts and circumstances, *e.g.*, *Biltmore Homes, Inc.* v. *Commissioner*, 288 F. 2d 336, 342 (C.A. 4), certiorari denied, 368 U.S. 825. The Tax Court's resolution of the issue, reinforced by the court of appeals' affirmance, should not be overturned.

4. Finally, as the Tax Court concluded (Pet. A6–A–7; I–R. 205–206), there is no merit in petitioner's attempt to qualify for relief under the novel theory that Sections 1031 and 1034 should be viewed as operating in tandem. Invoking a set of facts that the Tax Court refused to accept, petitioner argues that both the property at 455 North 35th Street and that at 2120 East 54th were used for residential as well as investment purposes, and that he disposed of both in order to purchase the property at 12508 Eighth Place, Everett, Washington, to be used as his principal residence and also for rental and investment purposes (Pet. 10–12). Apart from the fact that there is no

authority or reasonable basis for combining Section 1031 and Section 1034 to provide relief in circumstances not covered by either of them, the dispositive conclusion of the Tax Court is that in this case "there were two separate and independent sales and the only one upon which gain was realized was the sale of investment property for cash" (Pet. A7; I–R. 206).

The petition for certiorari should be denied.

Respectfully submitted.

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